

**A State Government of Sarawak v Chin Hwa Engineering
Development Co**

SUPREME COURT (KUCHING) — CIVIL APPEAL NO 01-36-94

B MOHD AZMI, EDGAR JOSEPH JR AND MOHAMED DZAIDDIN FCJJ
25 SEPTEMBER 1995

Arbitration — Arbitrator — Jurisdiction — Whether arbitrator has jurisdiction to determine issues of breach of contract — Whether jurisdiction determined by terms of arbitration clause

C *Civil Procedure — Arbitration — Jurisdiction of arbitrator — Whether arbitrator has jurisdiction to decide on issues of breach of contract — Jurisdiction determined by terms of arbitration clause*

D *Civil Procedure — Arbitration — Procedure — Challenging award of arbitrator — Whether losing party can rely on passive remedy of waiting until enforcement of award before resisting it — Whether must take steps to set aside award before enforcement sought — Arbitration Act 1952 s 24(2) — Rules of the High Court 1980 O 69 r 2(3)*

E This is an appeal from a judgment and order of the High Court at Kuching, giving leave to the respondent ('the contractor') to enforce an award of an arbitrator pursuant to s 27 of the Arbitration Act 1952 ('the Act'). The appellant ('the employer') had employed the contractor to carry out piling works along the proposed Kuching/Santubong/Teluk Bandung Road, Sarawak ('the contract'). During the progress of the works, disputes arose regarding the size of the bakau piles provided and the employer issued a letter suspending the contractor from future tendering until further notice ('the suspension order'). The contractor treated the suspension order as a wrongful repudiation and gave notice to the employer that it was referring the dispute to arbitration pursuant to cl 43 of the contract as a 'matter or thing of whatsoever nature arising thereunder or in connection therewith'. The arbitrator found in favour of the contractor, making an award for damages of RM721,233.90 and the parties later agreed on costs of RM70,400. However, the employer later alleged that the award was void as the arbitrator had exceeded his jurisdiction in making the award since he had no jurisdiction to determine the validity of the suspension order which ought to have been challenged by way of judicial review. The contractor successfully applied for leave to enforce the award and the trial judge held that the award was final and conclusive because no attempt had been made by the employer to challenge it earlier either by applying to set it aside under s 24(2) of the Act or by applying under O 69 r 2(3) of the Rules of the High Court 1980 for a declaration that the award was not binding. In this appeal, the employer argued, *inter alia*, that it was entitled to rely on the passive remedy of waiting until the contractor sought to enforce the award to resist such enforcement.

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Held, dismissing the appeal:

- (1) It was open to the employer to have had recourse to the passive remedy of resisting the enforcement proceedings under s 27 of the Act by relying on its complaint that the arbitrator had no jurisdiction to determine the validity of the suspension order. However, whether the employer could succeed in this contention was a separate matter altogether.
- (2) The perimeters of the arbitrator's jurisdiction must be determined having regard to the interpretation of the particular agreement in each case. Where the agreement provides for disputes or differences which have arisen 'in respect of' or 'with regard to' or 'under' or 'out of' the contract, or where similar words are used, it will give the arbitrator jurisdiction to decide all allegations of breach of contract by either party.
- (3) The suspension of the contractor and its losses suffered thereby, were the direct result of the disputes regarding the adequacy of the bakau piles provided by the contractor in performance of the contract. Therefore, the expressions 'as to any matter of whatsoever nature arising thereunder' or 'in connection therewith', in cl 43 were sufficient to include a dispute as to the validity of the suspension order and the arbitrator accordingly had jurisdiction to embark upon the hearing.

[Bahasa Malaysia summary]

Ini adalah suatu rayuan daripada penghakiman dan perintah Mahkamah Tinggi di Kuching, yang memberi kebenaran kepada penentang ('kontraktor itu') untuk menguatkuasakan suatu award penimbangtara mengikut s 27 Akta Timbangtara 1952 ('Akta itu'). Perayu ('majikan') telah menggaji kontraktor itu untuk menjalankan kerja memasang cerucuk di sepanjang Jambatan Kuching/Santubong/Teluk Bandung Road, Sarawak yang dicadangkan ('kontrak itu'). Semasa kerja itu dijalankan, pertikaian telah timbul berkenaan dengan saiz cerucuk bakau yang dibekalkan dan majikan telah mengeluarkan sepucuk surat untuk menggantung kontraktor itu daripada membuat tender pada masa depan sehingga notis selanjutnya ('perintah penggantungan itu'). Kontraktor itu telah menganggap perintah penggantungan itu sebagai suatu penolakan salah dan memberi notis kepada majikan bahawa ia akan merujuk pertikaian itu untuk ditimbangtara mengikut fasal 43 kontrak itu sebagai suatu 'perkara atau benda walau apa pun sifatnya yang timbul di bawahnya atau berkaitan dengannya'. Penimbangtara itu membuat keputusannya memihak kepada kontraktor, dengan membuat award ganti rugi sebanyak RM721,233.90 dan pihak-pihak itu kemudiannya bersetuju atas kos sebanyak RM70,400. Bagaimanapun, majikan itu kemudiannya mengatakan bahawa award itu tak sah kerana penimbangtara itu telah melampaui bidang kuasanya dalam membuat

- A award itu kerana beliau tidak mempunyai bidang kuasa untuk memutuskan kesahan perintah penggantungan itu yang seharusnya dicabar melalui kajian semula kehakiman. Kontraktor itu telah berjaya dalam permohonannya untuk mendapat kebenaran untuk menguatkuasa award itu dan hakim perbicaraan telah memutuskan
- B bahawa award itu adalah terakhir dan muktamad kerana tiada percubaan yang dibuat oleh majikan untuk mencabarnya terlebih awal sama ada dengan memohon untuk mengenyepikannya di bawah s 24(2) Akta itu atau dengan memohon di bawah A 69 k 2(3) Kaedah-Kaedah Mahkamah Tinggi untuk suatu deklarasi bahawa award itu tidak mengikat. Di dalam rayuan ini, majikan telah berhujah,
- C antara lain, bahawa ia berhak bergantung pada remedi pasif, iaitu menunggu sehingga kontraktor itu mencuba menguatkuasa award itu sebelum menentang penguatkuasaan itu.

Diputuskan, menolak rayuan itu:

- D (1) Ianya terpujang kepada majikan untuk menggunakan remedi pasif untuk menentang prosiding penguatkuasaan di bawah s 27 Akta itu dengan bergantung pada aduannya bahawa penimbangtara itu tidak mempunyai bidang kuasa untuk membuat keputusan tentang kesahan perintah penggantungan itu. Walau bagaimanapun, sama ada majikan boleh berjaya di dalam hujah ini adalah suatu perkara yang berasingan sama sekali.
- E (2) Had bidang kuasa seorang penimbangtara itu mesti ditentukan mengikut tafsiran perjanjian yang tertentu di dalam setiap kes. Di mana perjanjian itu membuat peruntukan untuk pertikaian atau perselisihan yang timbul 'berkenaan dengan', atau
- F 'berhubung dengan' atau 'di bawah' atau 'daripada' kontrak itu, atau di mana perkataan yang serba sama digunakan, ia akan memberi penimbangtara itu bidang kuasa untuk memutuskan semua pengataatan tentang kemungkiran kontrak oleh mana-mana pihak.
- G (3) Penggantungan kontraktor itu dan kerugian yang dialaminya akibat itu, merupakan kesan langsung daripada pertikaian mengenai cukup tidaknya cerucuk bakau yang dibekalkan oleh kontraktor itu apabila melaksanakan kontrak itu. Oleh yang demikian, ungkapan 'mengenai sebarang perkara walau apa pun sifatnya yang timbul di bawahnya' atau 'berkaitan dengannya' di dalam
- H fasal 43 adalah mencukupi untuk merangkumi perbalahan mengenai kesahan perintah penggantungan itu dan oleh itu, penimbangtara mempunyai bidang kuasa untuk menjalankan pembicaraan.]

I Notes

For cases on arbitration, see 1 *Mallal's Digest* (4th Ed, 1995 Reissue) paras 697-833; 2 *Mallal's Digest* (4th Ed, 1994 Reissue) para 722.

Cases referred to

Heyman v Darwins [1942] AC 356 (folld)

Middlemiss and Gould v Hartlepool Corp [1973] 1 All ER 172; [1972] 1 WLR 1643 (refd)

Union of India v Aaby (EB)'s Rederi A/S [1975] AC 797; [1974] 2 All ER 874; [1974] 3 WLR 269 (folld)

Legislation referred to

Arbitration Act 1952 ss 24(2), 27

Rules of the High Court 1980 O 69 rr 2(3), 4(1)

Arbitration Act 1950 s 26 [GB]

Appeal from: Originating Summons No KG-269 of 1992 (II) (High Court, Kuching)

Datuk JC Fong (*Abdul Rahman Seblin*, Legal Adviser, with him) (Peguan Besar Negeri Sarawak) for the appellant.

Margaret Loy (*Kho Lik Kiat* with her) (*Chan, Kho & Loy*) for the respondent.

Cur Adv Vult

Edgar Joseph Jr FCJ (delivering the judgment of the court): This appeal from a judgment and order of the High Court at Kuching, giving leave to enforce an award of an arbitrator dated 29 May 1992 as a judgment or order to the same effect, pursuant to s 27 of the Arbitration Act 1952 ('the Act'), arises out of an originating summons relating to a construction contract for civil engineering works, to wit, bakau piling for the embankments of the proposed Sungai Santubong Bridge along the proposed Kuching/Santubong/Teluk Bandung Road, Sarawak ('the contract') entered into by the appellant, the State Government of Sarawak as employer ('the employer') and the respondent, Chin Hwa Engineering Development Co as contractor ('the contractor').

All references to 'dollars' in this judgment are to 'Malaysian Ringgit'.

The contractor had taken possession of the site in early December 1985 and the piling work had commenced at the end of that month. During the progress of the construction work, disputes arose between the contractor and the employer regarding the size of the bakau piles provided; more particularly, whether they complied with the specifications stipulated in the contract. In the upshot, the employer, through its Deputy Director of Works issued a letter dated 18 March 1986, addressed to the contractor suspending the contractor from future tendering until further notice, in the following terms:

Public Works Department
Headquarters
Jalan Simpang Tiga
Kuching
Sarawak

A 18 March 1986

Chin Hwa Engineering Development Co
Lot 273, 1st floor
Beautiful Jade Centre
PO Box 544
Miri

B

Dear Sirs

Suspension from future tendering

This is to inform you that you are hereby suspended from future tendering until further notice.

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‘Hidup Selalu Berkhidmat’

Yours faithfully

—Sgd—

Director of Public Works
Sarawak

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The contractor treated the letter as evincing an intention on the part of the employer not to continue with the contract and therefore a wrongful repudiation thereof. Accordingly, on 27 March 1986, the contractor left the site leaving the works uncompleted and treated the contract as discharged.

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Then followed a notice by the contractor to the employer referring the dispute to arbitration pursuant to cl 43 of the contract which was in the following terms:

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Provided always that in case any dispute or difference shall arise between the employer or the engineer on his behalf and the contractor, either during the progress or after the completion or abandonment of the works, as to the construction of this contract or as to any matter or thing of whatsoever nature arising thereunder or in connection therewith (including any matter or thing left by this contract to the discretion of the engineer or the withholding by the engineer of any certificate to which the contractor may

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claim to be entitled or the measurement and valuation mentioned in cl 15 of these conditions or the rights and liabilities of the parties under cll 30, 40 or 41 of these conditions), then either party shall forthwith give to the other notice in writing of such dispute or difference, and such dispute or difference shall be and is hereby referred to the arbitration and final decision of a person to be agreed upon between the parties in accordance with and subject to, the provisions of the Arbitration Ordinance, and the award of

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such arbitrator shall be final and binding on the parties. Such reference, except on the questions whether or not a certificate has been improperly withheld or is not in accordance with cl 35 of these conditions, or on any dispute or difference under cll 40 or 41 of these conditions, shall not be opened until after the completion or alleged completion or abandonment of the works, unless with the written consent of the employer or the engineer

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on his behalf and the contractor. Subject to the provisions of cl 35(g) of these conditions the arbitrator shall without prejudice to the generality of his powers have power to direct such measurements and/or valuations as may in his opinion be desirable in order to determine the rights of the parties and to ascertain and award any sum which ought to have been the

subject of or included in any certificate and to open up, review and revise any certificate, opinion, decision, requisition or notice and to determine all matters in dispute which shall be submitted to him and of which notice shall have been given as aforesaid, in the same manner as if no such certificate, opinion, decision, requisition or notice had been given.

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Both the contractor and the employer then agreed upon an arbitrator. The case was then duly heard by the arbitrator ending in an award ('the award') made by the arbitrator in favour of the contractor as follows:

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- (1) damages for breach of contract and/or repudiation pursuant to para 29 of the points of claim in the sum of RM136,306.90;
- (2) special damages for breach of contract pursuant to para 31 of the points of claim in the sum of RM32,343;
- (3) general damages for wrongful suspension of its tender registration pursuant to para 32 of the points of claim in the sum of RM552,584;
- (4) interest on (1) and (2) at the rate of 8%pa from the date of the plaintiff's reference to arbitration, ie 24 January 1990, till final payment and on (3) at the same rate from 25 April 1990 till full payment; and
- (5) costs of the award (including arbitrator's fee, expenses, hiring room for the hearing) and costs of reference (including costs properly incurred by the plaintiff in the course of the arbitration).

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Following an exchange of correspondence between the parties, on 9 November 1992, costs of both the award and the reference had been agreed at RM70,400. Then by a letter dated 15 July 1992, the solicitors for the employer wrote to the solicitors for the contractor stating that necessary steps were being taken to effect payment of the arbitrator's award. However, very much to the surprise of the contractor, the employer by a letter dated 11 September 1992, changed its tune, saying:

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11 September 1992

Messrs Matthew TK Chan & Co
Advocates
Rm 202, Second floor
Wisma Bukit Mata Kuching
Jalan Tuanku Abdul Rahman
93100 Kuching

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Dear Sirs

Re: Contract for Bakau Piling for the embankments of proposed Sungai Santubong Bridge along the proposed Kuching/Santubong/Teluk Bandong Road, First Division — Arbitration Proceedings

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I refer to your letter dated 7 September 1992 requesting for payment of the award by the arbitrator.

- (2) The arbitrator had exceeded his jurisdiction or acted without jurisdiction in making the award.
- (3) The award is, therefore, void.
- (4) Any action taken by your clients to enforce the award will be strongly resisted.

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A 'Bersatu Berusaha Berbakti'
—Sgd—
Francis John ak Adam
Senior Legal Officer
for State Attorney General Sarawak

B cc State Financial Secretary Sarawak

In consequence, the contractor commenced the proceedings hereinbefore mentioned by way of originating summons for leave to enforce the award pursuant to s 27 of the Act. As pointed out at the outset, the judge granted the contractor's application and confirmed the award of the arbitrator, first in chambers and then, upon hearing further argument, in open court.

C The grounds upon which the judge so ordered were that the employer was precluded from questioning the award of the arbitrator, since prior to the application for leave to enforce the award as a judgment or order to the same effect under s 27 of the Act, the employer did nothing to question the award; for example, the employer did not take any step to have the award set aside under s 24(2) of the Act within the period of six weeks from the date of publication of the award limited by O 69 r 4(1) of the Rules of the High Court 1980, or at all, nor did it apply under O 69 r 2(3), for a declaration that the award was not binding on it.

E In the result, the judge held that the award was final and conclusive. He found support for this view in the decision of the Court of Appeal in *Middlemiss and Gould v Hartlepool Corp* [1973] 1 All ER 172; [1972] 1 WLR 1643 which is authority for the proposition that once an award has been made and the time limit for challenging it has expired, the award has become irrevocably final and binding and it can therefore be entered as a judgment and enforced accordingly. Lord Denning who was the presiding judge in that case said that the summary method of enforcing an award under s 26 of the English Arbitration Act 1950, which is in pari materia with s 27 of the Act, is to be used in nearly all cases and leave should be given to enforce the award as a judgment unless there is a real ground for doubting the validity of the award. So, the mere fact that there was a point of law which one side or the other thought might have been wrongly decided did not make the award invalid.

H The judge went on to hold that the dispute did lie within cl 43 of the contract because it was a dispute over a matter in connection with the contract. But then, with respect, he appears to have retreated somewhat from this conclusion, when he went on to say:

I ... The award being final and binding on the parties, it is for the defendant to honour it. Since the defendant had failed to do so, it is proper for the plaintiff to institute this proceeding for leave to enforce it. Having so held, I found that it is no longer necessary for me to determine whether or not the arbitrator has jurisdiction or lacks the jurisdiction to decide on the dispute referred to it by the plaintiff and the defendant pursuant to the said cl 43 of the contract and to hand down the award as he did in this case.

Before us, the Attorney General on behalf of the employer, had attacked the judgment of the court below on the ground that it failed to recognize

that the arbitrator had no jurisdiction to determine the validity of the suspension order which ought to have been, but was never challenged by way of judicial review, and, in consequence, he had no jurisdiction to award damages for the alleged wrongful suspension. It was therefore said that so much of the award as decided that the contractor was entitled to damages for wrongful suspension should be set aside and leave to enforce the award under s 27 of the Act, should have been refused by the judge.

By way of amplification, it was argued that the judge had misdirected himself in holding, as he did in fact hold, that the employer was precluded from challenging the validity of the award for the first time, at the very late stage of enforcement proceedings under s 27 of the Act, when it was open for it to have done so at a much earlier stage, under s 24(2) of the Act or under O 69 r 2(3) of the Rules of the High Court 1980. In support, our attention was directed to the following passage in *Commercial Arbitration* by Mustill and Boyd (2nd Ed) at p 546:

A party avails himself of a passive remedy does not himself take the initiative to attack the award, but simply waits until his opponent seeks to enforce the award by action or summary process, and then relies upon his matter of complaint as a ground why the court should refuse enforcement.

It was implicit in the submissions of the Attorney General that what he was contending for was a ruling by this court that the arbitration clause — cl 43 — was *not* wide enough to confer jurisdiction upon the arbitrator to determine the questions:

- (1) whether the suspension of the contractor from future tendering, until further notice, was unlawful; and
- (2) if so, what was the appropriate sum to award by way of damages for wrongful suspension?

We agree, that in certain circumstances, a party may avail himself of a passive remedy by which is meant he does not take the initiative to attack an award, but simply waits until his opponent seeks to enforce the award by action or summary process, when he resists enforcement. Mustill and Boyd on *Commercial Arbitration* (2nd Ed) at p 546 have instanced two situations when the passive remedy would be available; namely:

- (1) where the award is so defective in form or substance that it is incapable of enforcement;
- (2) where the whole or part of the award is ineffective, on the ground that the relief granted lies outside the jurisdiction of the arbitrator.

In the circumstances, we agree with the submission of the Attorney General that it was open to the employer to have had recourse to the passive remedy of resisting the enforcement proceedings under s 27 of the Act by relying on its complaint that the arbitrator had no jurisdiction to determine the validity of the suspension order and, consequently, no jurisdiction to award damages for alleged wrongful suspension, these being matters in dispute which were outside the scope of cl 43 of the contract. Whether or not the employer is entitled to succeed in this contention is, of course, a

A separate matter, and it is to this question that we must now direct our attention.

B Whether the matters in dispute did or did not fall outside the scope of cl 43 of the contract which speaks of any dispute or difference as to any matter or thing of whatsoever nature arising under the contract or in connection with the contract, is a question of construction and therefore a question of law.

C To recapitulate, it was during the course of construction of the works, that disputes had arisen between the contractor and the employer about the size of the bakau piles provided by the contractor for the project, in particular, whether they were in accordance with the specifications stipulated in the contract. As a result, the employer had by its letter dated 18 March 1986 addressed to the contractor, suspended the contractor 'from future tendering until further notice'. The contractor therefore took the position that the employer had thereby wrongfully repudiated the contract. The contractor next vacated the site, leaving the works D uncompleted and treated the contract as discharged.

E We note that the portions of the arbitration clause appearing in cl 43 of the contract, so far as material to the present case, are in pari materia with those appearing in the RIBA form sanctioned by the Royal Institute of British Architects. Clause 43 therefore defines the jurisdiction of the arbitrator in terms of, inter alia, 'any dispute or difference', inter alia, 'as to any matter or thing of whatsoever nature arising thereunder' or 'in connection therewith'. Under arbitration clauses in this form, the existence of a dispute or difference within the meaning of the arbitration clause is a condition precedent to the right to arbitrate.

F It is obvious that the perimeters of the arbitrator's jurisdiction must be determined having regard to the interpretation of the particular agreement in each case. And, Mustill and Boyd on *Commercial Arbitration* (2nd Ed) at p 117 have helpfully reminded us that:

G When faced with the problems of jurisdiction, the courts have usually confined themselves to considering whether a particular type of issue falls within the compass of a particular form of words. In general, they have not embarked upon exposition of the scope of any particular form of words, particularly since one often finds more than one formula used in the same clause and when comparisons have been drawn between the effects of various formulae, the results have not always been consistent. This being so H there is little profit in attempting a detailed survey and grading of the various forms in common use.

I Nevertheless, where the agreement provides for disputes or differences which have arisen 'in respect of', or 'with regard to' or 'under' (*Heyman v Darwins* [1942] AC 356 at p 366 (HL)) or 'out of' (*Union of India v Aaby (EB)'s Rederi A/S* [1975] AC 797; [1974] 2 All ER 874; [1974] 3 WLR 269 (HL)) the contract, or where similar words are used, then, taken at their full face value, it will give the arbitrator jurisdiction to decide all allegations of breach of contract by either party. The decision of the House of Lords in *Heyman v Darwins* decided that an arbitrator appointed by

virtue of a clause 'with regard to' or 'under' has jurisdiction to decide whether a contract has been repudiated by one of the parties. A

It appears to us that the root of the matter is that the suspension of the contractor from future tendering and the losses suffered by the contractor thereby, were the direct result of the disputes regarding the adequacy of the bakau piles provided by the contractor in performance of the contract. B
It is our view, therefore, that the expressions 'as to any matter of whatsoever nature arising thereunder' or 'in connection therewith', occurring in cl 43 are of sufficient amplitude to take in a dispute as to the validity of the suspension order dated 18 March 1986. It follows, therefore, that the dispute between the parties in the present case came within the terms of the cl 43 of the contract and that the arbitrator accordingly had jurisdiction C
to embark upon the hearing.

In the result, we dismiss the appeal with costs, and affirm all the orders made by the judge for payment out by the employer to the contractor of the various sums of money ordered by him including costs of the award and of the reference. Deposit to be paid out to the contractor to account D
of its taxed costs.

Appeal dismissed.

Reported by Prof Ahmad Ibrahim

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